

Claimant alleged accidental injury to his low back in January, 1995 while lifting small rolls of aluminum. Claimant testified that these aluminum rolls weighed in the range of forty-nine (49) to fifty (50) pounds and while lifting same his back started hurting. Claimant

had a pre-existing back problem and was working under a fifty (50) pound maximum lift weight limit, a restriction which respondent was aware of and was meeting.

Claimant testified that he had had prior back problems and that the pain usually went away. This time the pain did not go away and the day after the alleged incident, he went to his family doctor, Dr. James L. Logan. Dr. Logan took claimant off work for three (3) days. When claimant advised respondent that he would be off work, Roger Lamm, manager of the fabrication department, inquired as to whether claimant had suffered injury at work. He was advised by claimant that the problem did not originate at work. Claimant also talked to Donna McFarland, the assistant to administrative manager Sandy Medley, regarding his back problems. She was also advised by claimant that his condition was not work related. Further, claimant never requested workers compensation benefits and never requested that he be sent to a doctor as a result of any incident at work.

In March, 1995, claimant was terminated for absenteeism. At that time he talked to Sandy Medley, the administrative manager, who also handles workers compensation claims for the respondent. Claimant said nothing about hurting himself at work until after the termination. At no time before the termination, according to Ms. Medley, did claimant request medical treatment for a work-related injury.

Claimant argued that he did not claim workers compensation benefits at an earlier time because he was not sure of the specific diagnosis related to his back injury. He was aware, however, that as early as the day after his alleged injury in January, 1995, he had injured his back sufficiently to be taken off work for several days. Claimant was diagnosed on February 20, 1995 with a three (3) level bulging disc and conferenced with his follow-up physician Dr. Jacob Amrani on February 28, 1995 regarding the disc situation. Claimant did not advise respondent of his work-related injury until approximately March 8, 1995 when he talked to Sandy Medley.

K.S.A. 44-520 requires notice of an "accident," stating the time and place and particulars thereof and the name and address of the person injured be given to the employer within ten (10) days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.

Claimant, while advising respondent that he was off work, did not advise respondent of any work-related accident until approximately March 8, 1995, well over ten (10) days subsequent to the January, 1995 alleged date of injury.

K.S.A. 44-520 goes on to say:

"The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

Claimant argues that he had just cause in not reporting this accident within ten (10) days since he was not sure his injuries were work related until diagnosed by Dr. Amrani subsequent to the February 20, 1995 MRI. This argument does not convince the Appeals Board. A specific diagnosis of an injury accident is not necessary. Claimant was aware of a sudden onset of pain in January, 1995, followed by a period where he was required to be off work as a result of his ongoing symptomatology. K.S.A. 44-520 requires notice within ten (10) days of the accident, not within ten (10) days of a diagnosis.

The Appeals Board finds claimant failed to provide notice within ten (10) days of the date of accident as required by K.S.A. 44-520 and further finds that claimant has not shown just cause for his failure to provide said notice.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated April 25, 1995, shall be and is reversed and claimant shall be denied benefits due to his failure to satisfy the requirements of K.S.A. 44-520.

IT IS SO ORDERED.

Dated this ____ day of July 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I disagree with the majority opinion and find that under the circumstances presented, claimant did establish just cause in failing to provide notice within ten (10) days of the incident. Claimant had a pre-existing low back problem and did not realize he had sustained a new and distinct injury in January 1995, or a significant change in his spine, until he saw Dr. Amrani in February.

BOARD MEMBER

c: Tamara J. Pistotnik, Wichita, KS
P. Kelly Donley, Wichita, KS
John D. Clark, Administrative Law Judge
David Shufelt, Acting Director